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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SKYLE HUYNH, Plaintiff and Appellant, v. DANNY KUYKENDALL et al., Defendants and Respondents.	G056245 (Super. Ct. No. 30-2015-00781915) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Vikki L. Vander Woude, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

John L. Dodd & Associates, John L. Dodd, Benjamin Ekenes; Law Offices of Van Nghiem and Van Nghiem for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Dana Alden Fox, Matthew P. Harrison, Gregory M. Ryan and Dawn M. Flores-Oster for Defendants and Respondents.

* * *

Skyle Huynh appeals from the trial court's entry of judgment after granting summary judgment in favor of Danny Kuykendall and Danny Kuykendall dba Danny K's Billiard & Sports Bar (collectively, the bar). Huynh contends the court erred by (1) denying his oral request for a second continuance to oppose the bar's summary judgment motion, and (2) granting summary judgment in favor of the bar on Huynh's negligence complaint. Huynh's complaint asserted the bar was negligent in failing to protect him from a criminal assault in which he was "sucker punched" by an intoxicated patron outside the bar. As we explain, the court did not err in either denying the continuance or granting summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Huynh's complaint alleged that on January 24, 2015, "[a]t approximately 8:15 PM Samuel Martin, Jr., another patron of [the bar,] committed assault and battery against Plaintiff by intentionally punch[ing] his right eye and as a result Plaintiff fell to [the] ground. The incident occurred within a few feet of [the bar]'s front entrance. Plaintiff sustained [an] orbital floor fracture and severe, permanent damage to his body." In seeking punitive damages against Martin, Huynh's complaint alleged Martin had "lai[n] in wait for plaintiff," "lured plaintiff into a false sense of security by conversing with plaintiff," and "'sucker punched' plaintiff's right eye with the intention of injuring him." In addition to his intentional tort claim against Martin, Huynh's complaint alleged a premises liability claim against the bar based on negligence, asserting generally that the bar "negligently, carelessly and recklessly . . . caused plaintiff to be assaulted and battered, or failed to protect plaintiff from being assaulted and battered," thereby causing his injuries.

Huynh provided more detail about the assault in his discovery responses, explaining that he and a friend had entered the bar briefly that night and then stepped outside to wait for another friend to arrive. When Martin exited the bar and asked, "[D]o

you have a lighter?" Huynh replied "no." Huynh then explained, "[N]o, I'm vaping," and later added, "both of you smoke, and you don't have a lighter; it's going to be tough." Huynh's friend then said, "I have a lighter in my car, I will go get it," which Huynh conveyed to Martin, telling him "my friend will go get a lighter for you." Huynh then looked at his phone when he suddenly felt a "deep pain like he just got hit." Martin had "sucker punched [his] right eye." Huynh did not know Martin, had neither provoked him nor argued with him, and had no opportunity to defend himself against the assault.

After filing its answer denying liability in May 2015, and in the absence of any discovery requests by Huynh over the next 16 months, the bar filed a motion for summary judgment in August 2016. In support of its motion, the bar filed affidavits by its owner and manager stating there was no history of violent incidents at the bar. The manager did not see Martin engage in any aggressive behavior the night Huynh was struck and stated he had not received any prior complaints about Martin.

With the hearing on the motion set for December 14, 2016, the bar observed that Huynh had 128 days' notice of the hearing, rather than the statutory minimum of 75 days; according to the bar, Huynh did not conduct any formal discovery during that period.

In opposing summary judgment and seeking a continuance of the December hearing, Huynh's counsel explained she had located Martin in the Orange County Jail in September 2016. Counsel then conducted an informal interview with Martin at the jail. Counsel stated Martin "admitted to the criminal charge and thus was convicted." Martin would not agree to be deposed in jail, but told Huynh's counsel he would do so after his expected release in November 2016. Martin provided the following description of the night's events in his jail interview with counsel. He frequented the bar about two times a week in the two months before his assault on Huynh. The night of the assault was the eve of Martin's birthday and, according to Martin, the bar had a "long standing policy and practice" to provide free, "unlimited liquor" to patrons on their birthday. The bar

employees and manager were familiar with Martin and knew it was his birthday. Martin stated that he had "bags" under his bloodshot eyes and had already consumed 15 bottles of beer when he arrived at the bar. Although it should have been apparent he was already drunk, Martin indicated the bar gave him five shots of hard liquor over the course of the evening.

Eventually Martin passed out in his chair on the bar's back patio, where his condition was visible to all. When friends decided it was time to depart, they apparently roused Martin. As they left the bar, one of the employees called out, "You guys got a cab, right?" No employee, according to counsel's recap of Martin's jail interview, "followed Martin and his friends outside. No security escorted Martin and his friends off the facility."

Counsel's summary of her interview with Martin concluded: "After Martin and his friend went outside, his friend went back in to pay as Martin remained outside near the front entrance. Martin wanted to smoke and asked Plaintiff for a lighter. Plaintiff said no he did not have a lighter. Martin thought Plaintiff cussed at him so he lost control and punched Plaintiff."

At the December 2016 summary judgment hearing, the trial court granted Huynh a continuance until March 15, 2017, "to allow reasonable discovery."

Huynh was unable to locate Martin before the summary judgment hearing and, at that hearing, orally sought a second continuance. Counsel explained she did not believe she "could . . . propound meaningful discovery upon Defendants until Plaintiff has a chance to first depose Martin to get the full story . . . ." The trial court denied a second continuance and granted the bar's summary judgment motion. Huynh now appeals.

DISCUSSION

1. *General Contentions and Standard of Review*

Huynh argues the trial court erred in granting the bar's summary judgment motion and in denying his second request to continue the hearing to locate Martin and depose him. We review a grant of summary judgment de novo. (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 161.) In other words, we stand in the shoes of the trial court, applying the same rules and standards governing a trial court's resolution of a summary judgment motion. (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 925.) Because Huynh sought and obtained an initial continuance at the first summary judgment hearing, and then sought a second continuance to preclude summary judgment at the subsequent hearing, we will consider the summary judgment and continuance issues together on appeal. We review a trial court's denial of a continuance for abuse of discretion. (*Hamilton v. Orange County Sheriff's Dept.* (2017) 8 Cal.App.5th 759, 765.)

The bar's summary judgment motion targeted the foreseeability of Martin's attack. "A defendant moving for summary judgment bears the initial burden to show the plaintiff's action has no merit. [Citation.] The defendant can meet that burden by either showing the plaintiff cannot establish one or more elements of his or her cause of action or there is a complete defense to the claim. [Citations.] To meet this burden, the defendant must present evidence sufficient to show he or she is entitled to judgment as a matter of law. . . . [¶] Once the defendant meets that burden, the burden shifts to the plaintiff to present evidence establishing a triable issue exists on one or more material facts." (*Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 889 (*Carlsen*).) "The plaintiff opposing the motion, however, has no burden to present any evidence until the defendant meets his or her initial burden." (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 963.)

2. *Duty of Care: Foreseeability and the Scope of Duty*

Foreseeability is an essential component of the duty of care element of a negligence action. "The elements of negligence are established when it is shown 'that the defendant owed the plaintiff a legal duty, that the defendant breached the duty, and that the breach was a proximate or legal cause of injuries suffered by the plaintiff.'" (*Barber v. Chang* (2007) 151 Cal.App.4th 1456, 1463.) "The existence of a duty is a question of law for the court. [Citations.] Likewise, '[f]oreseeability, when analyzed to determine the existence or scope of a duty, is a question of law to be decided by the court.'" (*Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1188 (*Sharon P.*), disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527, fn. 5 (*Reid*), and in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853, fn. 19.)

While "it is well established that landowners must maintain their premises in a reasonably safe condition" (*Sharon P.*, *supra*, 21 Cal.4th at p. 1189), the Supreme Court has concluded courts must analyze "third party criminal acts differently from ordinary negligence," requiring "a heightened sense of foreseeability before we can hold a defendant liable for the criminal acts of third parties." (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1149-1150.) Limiting liability this way is necessary, according to the high court, because "it is difficult if not impossible in today's society to predict when a criminal might strike" and, "if a criminal decides on a particular goal or victim, it is extremely difficult to remove his every means for achieving that goal." (*Id.* at p. 1150.)

This precedent affects the existence and scope of a business's duty of care to its customers. For example, "only when 'heightened' foreseeability of third party criminal activity on the premises exists—shown *by prior similar incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location*—does the scope of a business proprietor's special-relationship-based duty include an

obligation to provide guards to protect the safety of patrons." (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 240 (*Delgado*), italics added.)

Security guards are neither the minimum threshold, nor the outer limit, of a business's duty of care when criminal conduct is foreseeable. Instead, a sliding scale applies: the more foreseeable and the greater the potential harm, the greater the burden the law may impose to protect against it. (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1213.) Conversely, simple protective measures may be required as a minimal safeguard, but the greater the burden and the less foreseeable the harm, the narrower the scope of the proprietor's duty. (*Ibid.*; *Delgado*, *supra*, 36 Cal.4th at p. 243.)

The Supreme Court has illustrated both ends of this sliding scale. (See *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666 (*Ann M.*), disapproved on another ground in *Reid, supra,* 50 Cal.4th at p. 527, fn. 5; *Delgado*, *supra*, 36 Cal.4th 224.) In *Ann M.*, an employee of a business tenant in an outlying building in a small shopping center was raped in the tenant's shop and asserted negligence against the shopping center for lack of security patrols. The high court held that under the facts of that case, neither guards nor patrols were required. The court reasoned that because these measures entailed significant costs and providing patrols "adequate to deter criminal conduct is not well defined," a "high degree of foreseeability is required in order to find that the scope of a landlord's duty of care includes the hiring of security guards." (*Ann M.*, at p. 679.)

In *Delgado*, the high court held that to establish a duty to provide burdensome security measures, "the requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises." (*Delgado*, *supra*, 36 Cal.4th at p. 238.) But the court explained that prior incidents need not be *identical*, rejecting the Court of Appeal's conclusion in that case that the plaintiff was required to produce evidence of an earlier '"coordinated gang attack on an individual patron.'" (*Id.* at p. 245.) The court also explained that while a limited

history of past criminal acts does not warrant costly protective measures, circumstances as they unfold at the time may call for minimally burdensome, relatively simple steps in response. (*Ibid.*)

Delgado recognized as established law the principle that a bar proprietor must respond to imminent criminal conduct. (*Delgado, supra*, 36 Cal.4th at pp. 246-247, citing, e.g., *Taylor v. Centennial Bowl, Inc.* (1966) 65 Cal.2d 114, 123-125; *Saatzer v. Smith* (1981) 122 Cal.App.3d 512, 518 (*Saatzer*).) In *Delgado*, the "defendant had actual notice of an impending assault involving [an assailant named] Joseph and plaintiff." (*Delgado, supra*, 36 Cal.4th at p. 250.) The plaintiff and assailant had exchanged prior "hostile stares"; the plaintiff's wife told a security guard there was going to be a fight; the security guard determined the circumstances merited directing the plaintiff to leave the bar; the security guard then failed to escort the plaintiff to his car in the parking lot or to coordinate with the outside security guard to keep the assailant and his fellow gang members away from the plaintiff. (*Id.* at p. 231.) Though the "defendant's employee and guard, Nichols, was aware of facts that led him to conclude . . . a fight was likely to occur," causing him to "remov[e] plaintiff from the bar" to the parking lot, the guard essentially left the plaintiff at the mercy of the assailant and his cohort there. (*Id.* at pp. 246-247.)

The Supreme Court observed that "minimally burdensome measures may have included . . . Nichols attempting to maintain the separation between plaintiff and Joseph's group that Nichols had determined was [necessary], by turning his attention to Joseph and his companions in order to dissuade them from following plaintiff" or, "in the face of the continuing threat of a five-on-one altercation," Nichols or other bar staff "also might have confirmed that the outside guard was at his *post* in the parking lot and was available, as necessary, to help maintain the desired separation between plaintiff and Joseph and his companions." (*Delgado, supra*, 36 Cal.4th at pp. 246-247.)

With these principles in mind, we turn to our de novo consideration of summary judgment.

3. *Summary Judgment Procedure and Analysis*

A. *Three-Step Analysis*

The Supreme Court has explained that when third party criminal conduct is at issue, the "duty analysis . . . requires the court in each case (whether trial or appellate) to identify the specific action or actions the plaintiff claims the defendant had a duty to undertake. 'Only after the scope of the duty under consideration is defined may a court meaningfully undertake the balancing analysis of the risks and burdens present in a given case to determine whether the specific obligations should or should not be imposed on the landlord.'" (*Castaneda*, *supra*, 41 Cal.4th at p. 1214.)

Castaneda set out a three-step analytic process: "'First, the court must determine the specific measures the plaintiff asserts the defendant should have taken to prevent the harm. This frames the issue for the court's determination by defining the scope of the duty under consideration. Second, the court must analyze how financially and socially burdensome these proposed measures would be to a landlord, which measures could range from minimally burdensome to significantly burdensome under the facts of the case. Third, the court must identify the nature of the third party conduct that the plaintiff claims could have been prevented had the landlord taken the proposed measures, and assess how foreseeable (on a continuum from a mere possibility to a reasonable probability) it was that this conduct would occur. Once the burden and foreseeability have been independently assessed, they can be compared in determining the scope of the duty the court imposes on a given defendant. The more certain the likelihood of harm, the higher the burden a court will impose on a landlord to prevent it; the less foreseeable the harm, the lower the burden a court will place on a landlord.'" (*Castaneda*, *supra*, 41 Cal.4th at p. 1214.)

Here, this multi-step analysis comes down to a single issue—foreseeability—because Huynh's complaint did not suggest any protective measures the bar owed him.

B. *The Bar Met Its Initial Summary Judgment Burden*

To meet its initial burden in moving for summary judgment, a defendant "'need address only the issues raised by the complaint.'" (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1253.) The bar met its summary judgment burden to negate an element of the plaintiff's negligence complaint by submitting evidence in support of its motion that Martin's attack was unforeseeable. Therefore, the bar owed Martin no duty to prevent it. Indeed, Huynh's complaint suggested as much by alleging that Martin had "lai[n] in wait for plaintiff," "lured plaintiff into a false sense of security by conversing with plaintiff," and then "'sucker punched' plaintiff." Nothing in the complaint indicated Martin's attack was foreseeable to the bar.

Additionally, the bar produced evidence supporting its summary judgment motion. Kuykendall, the bar's owner, declared that the bar had no "history of violent crimes occurring on its premises" and the front patio area where the assault occurred "is not an area where patrons typically congregate," but instead "serves merely as a transition [from] the parking lot" to the bar's interior. Kuykendall further declared the bar employed two security guards, including on the night of the assault; they "are generally stationed inside the establishment," as they were that night. The bar's general manager also provided a declaration stating that, in his 15 years' experience there had been no incidents of violence on the front patio where Martin struck Huynh. The manager further stated that he personally observed Martin inside the bar that evening, did not see him "exhibit any aggressive behavior," and "did not receive any complaints regarding Mr. Martin or his behavior."

This evidence satisfied the bar's initial burden to establish it was entitled to summary judgment, shifting the burden to Huynh to introduce evidence "establishing a triable issue exists on one or more material facts." (*Carlsen, supra*, 227 Cal.App.4th at p. 889.) Specifically, the bar in its initial showing negated the duty element of Huynh's negligence cause of action because, in the absence of any foreseeable criminal conduct, the bar owed Huynh no duty of care to prevent Martin's assault.

C. *The Trial Court Did Not Err in Granting Summary Judgment*

The party opposing summary judgment must present evidence once its opponent has borne its burden. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162-163.) "[A] party cannot rely on the allegations of his own pleadings," nor on speculation, imagination, guess work, or mere possibilities. (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 720, fn. 7; *Yuzon v. Collins* (2004) 116 Cal.App.4th 149, 166.)

In opposing summary judgment, Huynh obtained a continuance of the first summary judgment hearing scheduled in December 2016 by submitting his attorney's hearsay account of her September 2016 jail interview with Martin. The trial court "recognize[d] the long delay in obtaining discovery but" ordered a continuance of the summary judgment hearing until March 15, 2017, "to allow Plaintiff to substantiate his position."

The parties stipulated to a different judicial officer to hear the summary judgment motion in March 2017. At the hearing, the trial court concluded a supplemental opposition to oppose summary judgment that Huynh submitted just before the hearing was late, but considered it as "an offer of proof" to support Huynh's request for a second continuance and to oppose summary judgment.

The supplemental opposition again included counsel's account of her jail interview with Martin, this time under penalty of perjury. Counsel's account of the jail

interview remained hearsay, but for purposes of our analysis here, we will consider the protective steps Huynh asserted both in his original and supplemental opposition that the bar owed him a duty of care to provide: namely, to escort Martin from the bar or to have refrained from providing Martin with free drinks on his birthday. Even assuming the court had granted a second continuance and Huynh had obtained Martin's deposition testimony to provide a competent evidentiary basis for these claims, they fail as a matter of law.

Huynh relied on *Delgado* in asserting the bar owed him a duty to escort Martin outside, particularly after, according to Huynh, the bar overserved Martin with free liquor. This first step in the Supreme Court's three-part analytic framework—a concrete assertion of the specific duty owed—leads to the second step: assessing the burden.

As was the case in *Ann M.*, where the number and nature of guards or patrols "adequate to deter criminal conduct [wa]s not well defined," the burden here is difficult to assess because it is so variable. (*Ann M.*, *supra*, 6 Cal.4th at p. 679.) Requiring an escort for every patron to his or her vehicle would require a sizable staff and would create a heavy burden for the bar owner in time and expense. Doing so when a bar offers drink promotions or after a certain number of drinks is an arbitrary standard and a significant intrusion on a proprietor's ability to run his or her business.

But it is the third step—foreseeability—that is dispositive here. In *Delgado*, the Supreme Court explained that a duty to respond to potential criminal conduct arises from the emerging circumstances at hand. There, because it was so manifestly foreseeable that a fight was about to break out—indeed, the security guard in *Delgado* himself perceived the threat and acted to eject the plaintiff—the Supreme Court determined that providing simple safeguards to an identifiable, targeted potential victim was reasonably required.

Here, there was no similarly foreseeable criminal conduct as these events unfolded inside the bar. While passed out, Martin presented no threat to anyone. Then he left without saying a word, according to his account to Huynh's counsel. He caused no disturbance, elicited no complaints, and nothing suggested any impending threat or danger to the bar manager, who according to Martin (by way of Huynh's counsel) personally served him a drink.

According to Martin, a bar employee called out to his group, "You guys got a cab right," but any concern related to drunken driving that this inquiry may have suggested is not the sort of imminent criminal altercation that *Delgado* or its line of cases suggest should elicit immediate protective measures against a patron-instigated brawl. There was no evidence threat that the bar ignored a threat from someone "whose conduct had become obstreperous and aggressive to such a degree the tavern keeper knew or ought to have known he endangered others." (*Saatzer*, *supra*, 122 Cal.App.3d at p. 518.) Nor was there evidence that Martin had, as in *Saatzer*, "a known propensity for fighting." (*Ibid.*) Nor, unlike in *Delgado*, had the bar "been warned of danger from an obstreperous patron and failed to take" protective measures. (*Saatzer*, at p. 518.)

Martin told Huynh's counsel that when he is drunk, he "loses control of his emotion and behavior." Assuming for the sake of argument the truth of this hearsay statement, it does not create a conflict in the evidence that is essential to defeat summary judgment. "'An issue of fact can only be created by a conflict of evidence. It is not created by "speculation, conjecture, imagination or guess work." [Citation.] Further, an issue of fact is not raised by "cryptic, broadly phrased, and conclusory assertions" [citation], or mere possibilities [citation]. "Thus, while the court in determining a motion for summary judgment does not 'try' the case, the court is bound to consider the competency of the evidence presented." [Citation.]' [Citation.] Responsive evidence that 'gives rise to no more than mere speculation' is not sufficient to establish a triable issue of material fact." (*Carlsen*, *supra*, 227 Cal.App.4th at pp. 889-890.)

For the foregoing reasons, based on our independent review, we conclude that the trial court did not err in granting summary judgment.

4. *Continuance*

Huynh argues the trial court erred in denying his oral request for a second continuance so he could locate and depose Martin. Huynh contends he was diligent in attempting to find Martin after he was released from jail and that he could not meaningfully pursue other discovery until he had first deposed Martin for "the full story."

A. *Procedural Background*

Huynh's counsel explained in her supplemental opposition that she had hired a private investigator in December 2016 to locate Martin after he did not keep his promise to contact her after being released from jail. The investigator reported on January 3, 2017, that he could not locate Martin. The next day, counsel hired another investigator who three weeks later provided an address in Huntington Beach for Martin. Counsel personally went to the apartment complex, knocking on many doors, but could not locate Martin. On February 1, 2017, the investigator provided two more addresses, one in Tustin that proved fruitless, and another in Irvine, where counsel found Martin's mother. Martin's mother relayed that her son was "out of jail and . . . doing very well." Huynh's counsel gave her business card to Martin's mother and requested that she have Martin contact her.

On February 3, 2017, counsel served a business records subpoena on the Orange County Probation Department in an attempt to find Martin's current address, but the department responded that it could not provide the information without a court order. Counsel wrote a letter to Martin at his last address, to no avail.

Counsel hired a new investigator and process server on February 15, 2017, to attempt to locate and serve Martin with a civil subpoena and deposition notice. However, the new investigator was unsuccessful in locating Martin. On March 9th, the

superior court denied counsel's ex parte application for an order to have the probation department disclose Martin's address. The bar's attorney previously advised Huynh's counsel that she was not available to attend Martin's deposition on March 9th. When Huynh's counsel attempted to reschedule the deposition between March 23 and April 13, with trial scheduled for mid-April, opposing counsel responded that those dates were after the discovery cut-off. The bar's counsel did not dispute that she also had to cancel the bar's three earlier attempts to take Martin's deposition because they also could not locate him.

Unable to locate or depose Martin, Huynh began to conduct other discovery. On February 2, 2017, Huynh served a records request on the Orange Police Department, seeking any documents in the department's possession from the last 10 years related to the bar, including "police reports, incident reports, [and] investigative reports." Counsel for the bar responded with a letter to the department and to Huynh requesting that the demand be amended because it was overbroad and to avoid violating third party privacy rights. It does not appear Huynh amended the request or sought to compel production of the documents before the March 15, 2017, summary judgment hearing.

B. *The Trial Court Did Not Err in Denying a Second Continuance*

Relying on Code of Civil Procedure section 437c, subdivision (h), Huynh argues the trial court was required to grant his second continuance request because he supported it with an attorney affidavit. That section provides: "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication, or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court *shall* deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be

made by ex parte motion at any time *on or before the date the opposition response to the motion is due*." (Italics added.)

In earlier seeking the first continuance, Huynh had submitted his attorney's unsworn account of her interview with Martin, which she described in the facts section in her memorandum opposing summary judgment. Huynh submitted a supplemental opposition to the motion for summary judgment on March 9, 2017, six days before the hearing. The opposition included counsel's sworn affidavit recounting the same jail interview with Martin in substantially the same terms, but the opposition was a week late, and Huynh did not request a continuance until the hearing itself on March 15, 2017. On that ground alone, the trial court did not err in denying the belated continuance request. (See *Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 547 ["Roth did not request the continuance until the time of the hearing. This, in and of itself, is an adequate basis for denial of the continuance"]; *Ambrose v. Michelin North America, Inc*. (2005) 134 Cal.App.4th 1350, 1353 ["Ambrose failed to request a continuance of the summary judgment motion hearing at any time prior to the hearing itself, not to mention prior to the deadline for opposing the motion"].)

Had the request been timely, the affidavit did not provide a basis for a further continuance. The threshold question presented by a section 437c, subdivision (h) request is: Does the supporting affidavit show "that facts essential to justify opposition may exist but cannot, for reasons stated, be presented"? (Code Civ. Proc., § 437c, subd. (h).) Huynh contends in his brief on appeal that summary judgment was improperly granted because, "[h]ad the court granted the continuance request, and had [his] counsel obtained Martin's deposition testimony, it is reasonably probable Martin *would have testified to the same facts as he had reported [in his jail interview] in September 2016*." (Italics added.) But as discussed, even assuming the initial account Martin gave was accurate, as a matter of law, it did not make his unprovoked criminal

assault on Huynh foreseeable. Consequently, there was no error in the trial court denying the continuance.

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

GOETHALS, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.